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IN THE
# *SUPREME COURT OF THE UNITED STATES*

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GLENN CARROL SCOTT

VS.

STATE OF GEORGIA.

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On Petition For Writ Of Certiorari
To The Supreme Court of Georgia

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## PETITION FOR WRIT OF CERTIORARI

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26 pp

## QUESTION PRESENTED FOR REVIEW

Does the Georgia Supreme Court decision prohibiting admission of polygraph evidence which is not based on any rule made by a valid rulemaker but based on foreign judicial decisions only, violate the standard set forth in United States v. Scheffer, 523 U.S. 303 (1998), which requires that for such evidence to be excluded it must be based upon (1) a valid rule (2) established by the appropriate rulemaker (3) which serves a legitimate purpose; and (4) is not arbitrary or capricious?

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## TABLE OF CITED AUTHORITIES

Brooks v Parkerson, 265 Ga. 189, 454 S.E.2d 769 (1995).

McCutcheon v. State, 199 Ga. 685, 690, 691, 35 S.E.2d 144 (1945).

Preston v. State, 257 Ga. 42, 354 S.E.2d 135 (1987).

Rock v. Arkansas, 483 U.S. 44 (1987).

Rucker v. State, 272 Ga. 750, 534 S.E.2d 71 (2000).

Salisbury v. State, 221 Ga. 718, 146 S.E.2d 776 (1966).

United States v. Scheffer, 523 U.S. 303 (1998).

## CITATIONS OF REPORTS AND/OR ORDERS OF LOWER COURTS

1. Tattnall County Superior Court Trial Jury returned a conviction of petitioner on November 6, 1999.

2. The Supreme Court of Georgia denied petitioner's appeal of said conviction on June 4, 2001. Glenn Carroll Scott v. The State, No. S01A0561, 2001 Ga. LEXIS 426 (Ga. June 4, 2001).

3. The Supreme Court of Georgia denied Petitioner's Motion for Reconsideration on July 16, 2001.

## BASIS FOR JURISDICTION

Jurisdiction is proper in this Court. On June 4, 2001, the Supreme Court of Georgia ruled on an important federal question in a way that conflicts with relevant decisions of the Supreme Court of the United States. On July 16, 2001, the Supreme Court of Georgia denied Petitioner's Motion for Reconsideration.

## STATEMENT OF FACTS

This matter arises out of a fatal shooting that took place on February 9, 1997. This incident arose in the context of divorce between Petitioner and his wife. (Trial Tr. vol. 2 page 371 at 22.) Petitioner had been informed by his divorce attorney that if he was able to photograph his wife while having one of her adulterous relationships he would be able to obtain custody of his two minor sons. (Trial Tr. vol. 2 page 371 at 22.) Petitioner was recording his home phone based upon the advice of the local police chief. (Trial Tr. vol. 2 page 365 at 19; Trial Tr. vol. 2 page 367 at 15.) Petitioner was therefore able to tell when his wife was having relations with one of her multiple boyfriends.

In pursuit of obtaining evidence of his wife's relationships with others the Petitioner hired two separate private investigators to obtain photographic evidence of her relationships. Neither of the investigators hired by Petitioner were successful in their attempts to obtain photographic

evidence of Petitioner's wife and others. (Trial Tr. vol. 2 page 365 at 19.) Petitioner at that point took matters into his own hands and attempted to photograph his wife with one of her boyfriends, the victim in this matter. (Trial Tr. vol. 2 page 379 at 23.) Petitioner was able to photograph his wife and the victim while engaged in their adulterous relations. (Trial Tr. vol 2 page 396 at 17; See also State's Ex. 46 - 58.) Subsequently, all three parties continued to have a conversation at which time a fight arose over possession of the camera used by Petitioner to take the photographs; during which Petitioner shot himself and the victim resulting in the victim's death. (Trial Tr. vol. 2 page 406 at 19; Trial Tr. vol. 2 page 407 at 17.) Petitioner contended the shooting was in self-defense with his wife contending it was a deliberate murder.

Petitioner was indicted on October 21, 1998 charging the Petitioner as follows: Count 1 - Murder; Count 2 - Felony Murder; Count 3 - Aggravated Assault; Count 4 - Aggravated

were several meetings, Your Honor.

We actually came there different times for the motion to dismiss the indictment, and I can't swear as to which particular date all of these conversations took place. But my memory is that part of them took place in each of these meetings.

But the offer was that Glenn, with Hugh and I, would go to the scene of the crime with John Edwards, John Barry, and Horace Waters, who was to be the polygraph examiner, who is still currently a GBI agent, whomever from the sheriff's office wanted to go and whomever from the district attorney's office who wanted to go, walk them through what happened on the incident of this shooting, let Glenn take them entirely through the situation, let them take Glenn back to the GBI headquarters, interview him, polygraph him, and re-interview him.

We agreed that they could use that polygraph for stipulated use at trial, stipulated use at grand jury only, because at that time we were discussing the fact that they were going to dismiss the pending indictment, or for no stipulated use at all, just for their personal edification. That offer was denied on two or three times when Tom was still in the case.

Then subsequently, Steve Archer took over representation of the State. We had a scheduling meeting with you sometime in July at the

> Ludowici courthouse of this year. Unfortunately, our signals got crossed, and you weren't there, but Steve and Hugh and myself all appeared at the Ludowici courthouse.
>
> I had the same conversation with Steve and made the same offer regarding to use the polygraph for stipulated use at trial. As the Court knows, we still had - - they had unindicted and reindicted at that time, but we still had another motion to dismiss pending, to allow that motion to go through and use it at grand jury only or for no use at trial or at grand jury, just for their own personal education as to what really transpired in this case.
>
> Steve indicated that he was favorable on that, but he needed to confer with John Edwards. It was my understanding that he conferred with John Edwards, not with Tom Durden, and that based upon his conference with Mr. Edwards, that that offer was denied.

Mot. Hearing Tr. page 16, at 25 through page 20 at 11.

Prior to trial the Petitioner filed a motion to admit the evidence of the request to take the polygraph examination and surrounding events, based on the holding in United States v. Scheffer, 523 U.S. 303 (1998). This motion was denied by the trial court.

Petitioner went to trial in this matter on November 3, 1999 through November 6, 1999 and was ultimately found guilty by the jury of murder, not guilty felony murder, guilty on aggravated assault, not guilty on eavesdropping. (Trial Tr. vol. 4 page 836-837.)

**The trial court's decision on admission of the polygraph evidence and surrounding events was upheld by the Georgia Supreme Court without even considering the possible conflict of the Georgia scheme and the decision in United States v. Scheffer, 523 U.S. 303 (1998).**

## ARGUMENT AND CITATIONS OF AUTHORITY

In Georgia, the establishment of rules of evidence is a legislative function. Preston v. State, 257 Ga. 42, 354 S.E.2d 135 (1987). The legislative functions are exclusively within the province of the Georgia General Assembly. Ga. Const. art. 3, § 1, para. 2, (1983). The only appropriate rule-maker with power to exclude this evidence is the Georgia General Assembly. Because the Georgia General Assembly has created no statutory bar to introduction of the evidence at issue, the evidence was admissible. The trial court erred in excluding this evidence.

The Supreme Court of Georgia relied upon one of its own decisions and its progeny in excluding this evidence. Salisbury v. State, 221 Ga. 718, 146 S.E.2d 776 (1966). The Salisbury decision found that results of polygraph examinations are unreliable and thus inadmissible. Id. at 719. The Salisbury decision is not based on any Georgia statutory authority but judicial decisions from foreign jurisdictions.

Under the Georgia Constitution, the legislative, judicial and executive powers are separate and distinct, and no person discharging the duties of one shall at the same time exercise the functions of either or the other. Ga. Const. art. 1, § 2, para. 3 (1983). The doctrine of separate and distinct powers is to be strictly enforced. McCutcheon v. State, 199 Ga. 685, 690, 691, 35 S.E.2d 144 (1945).

Under the separation of powers doctrine, the function of the legislature is to establish the law while the function of the judiciary is to interpret the law. Id. By decreeing that polygraph examination results are not admissible, the Supreme Court did more than merely interpret law; it created new law by judicial fiat: the erection of a new substantive evidentiary bar on polygraph evidence. Because the Salisbury holding is judicially-created and not based upon a statute promulgated by the Georgia General Assembly, the Salisbury cases cannot be the vehicle to prevent this crucial evidence at trial. See Brooks v Parkerson,

265 Ga. 189, 454 S.E.2d 769 (1995)(State of Georgia can infringe upon a person's constitutional rights only through legislative enactments).

Therefore the evidentiary rule on polygraphs having been made by the Georgia Supreme Court rather than the legislature is violative of the Separation of Powers Doctrine set forth in Georgia Constitution Article 1, § 2, Para. 3 (1983) and is not a valid rule of evidence.

In United States v. Scheffer, 523 U.S. 303 (1998) (relying on Rock v. Arkansas, 483 U.S. 44 (1987)), the United States Supreme Court held that a defendant has the right to present a defense, including polygraph examinations. The Supreme Court held that such right was not absolute but could only be abridged by (1) a valid rule (2) established by the appropriate rule maker (3) which serves a legitimate purpose; and (4) is not arbitrary or capricious.

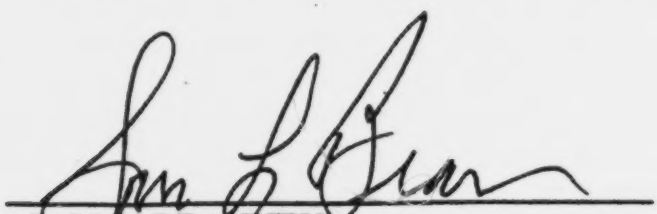
The Georgia evidentiary rule on polygraphs is violative

of the Scheffer opinion by not being a rule established by the appropriate rule maker. In this case, the appropriate rule maker is the Georgia Legislature. The Georgia rule is further violative of Scheffer by being established by the Georgia Supreme Court, there is no one to review it to determine if it serves a legitimate purpose and is not arbitrary nor capricious. United States v. Scheffer, 523 U.S. 303 (1998).

## CONCLUSION

For the reasons set forth above Petitioner prays that this Court grant this petition for writ of certiorari to determine if the Georgia exclusionary rule on polygraph evidence established by the Georgia Supreme Court, not based on any valid rule, not established by the appropriate rulemaker; not able to be reviewed by any other than the same court that established the rule is violative of the United States Supreme Court Decision of United States v. Scheffer, 523 U.S. 303 (1998).

Respectfully submitted this 3rd day of December, 2001.



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APPENDIX A

**GLEN CARROLL SCOTT**
**vs.**
**THE STATE.**

S01A0561.
SUPREME COURT OF GEORGIA
2001 Ga. LEXIS 426
June 04, 2001, Decided

**DOCUMENT STATUS:** NOT FINAL UNTIL EXPIRATION OF THE REHEARING PERIOD. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BY THE COURT.

Tattnall County Superior. Trial Judge: Hon. Robert L. Russell, III. Date of Judgment Appealed: 10-17-00. Notice of Appeal Date: 10-20-00. Lower Ct #: 98R175.

**COUNSEL**

For GLEN CARROLL SCOTT: Hugh J. McCullough, Glennville, GA, Claude M. Kicklighter, Jr., KICKLIGHTER & PERSSE, Springfield, GA, Robert Lawrence Persse, KICKLIGHTER & PERSSE, Springfield, GA.

For THE STATE: Dupont K. Cheney, D.A., Hinesville, GA, Carole E. Wall, Special A.D.A., Prosecuting Attorney's Council of Georgia, Savannah, GA, Hon. Thurbert E. Baker, A.G., Department of Law, Atlanta, GA, Adam Marshall Hames, A.A.G., Department of Law, Atlanta, GA, Paula K. Smith, Senior A.A.G.,Department of Law, Atlanta, GA, Stephen D. Kelley, D.A., Brunswick, GA.

## JUDGES

FLETCHER, Presiding Justice. All the Justices concur.
**AUTHOR:** FLETCHER

## OPINION

FLETCHER, Presiding Justice.

A jury convicted Glen Carroll Scott of malice murder, aggravated assault, and possession of a firearm in connection with the shooting death of Danny O'Neal Ray and the beating of Wendi Scott, the defendant's wife.[1] Scott contends that the trial court erred in its charge on aggravated assault and this erroneous charge means that his murder conviction should be reversed. Because the defendant had adequate notice of the aggravated assault charges, we find no error and affirm his convictions.

1. The evidence presented at trial shows that Scott had placed a recording device under the couple's trailer and was taping his estranged wife's telephone conversations in an attempt to gain custody of their two children. He returned to her home one night to change the tape and remained when he saw his wife inside with Ray, a family friend. Later, as the couple engaged in sexual intercourse, Scott opened the bedroom window to take a photograph, but the lighting and view were too poor. He then unlocked the front door, walked down the hallway to the bedroom and took a flash photograph of them, flipping on the light switch with his gun. With the camera in his left hand and a Colt .45 pistol in his right hand, he continued taking at least a dozen photographs as Ray and Wendi Scott tried to hide under the sheets and bedspread and as Ray dressed. Scott attempted to pull the covers off his wife and struck her on

the side of the head with his pistol. The two men struggled with the gun and Scott shot himself in the leg. Wendi Scott testified that Scott shot Ray once or twice after he had fallen and was lying face down on the bed.

Ray was found in a kneeling position next to the bed with his head and chest resting on the mattress, he had been shot twice in the head, once in the neck, and once in the thumb. He did not have a weapon. Police found four spent shell casings and three bullets; one bullet fell from the victim's face when it was moved and a second bullet was found in a pool of blood under his body. The medical examiner testified that the two bullets found Ray's body show that he was shot while in that position and did not move after he was shot. The fatal bullet was the one that entered the top of the victim's head and exited beside his nose. After reviewing the evidence in the light most favorable to the jury's determination of guilt, we conclude that a rational trier of fact could have found Scott guilty of the crimes charged.[2]

2. In **Harwell v. State,**[3] we held that a defendants' due process rights were violated when the indictment alleged on method of committing an aggravated assault and the trial court instructed the jury on an alternative method of committing an aggravated assault and the trial court instructed the jury on an alternative method without charging the jury to limit its consideration to the manner specified in the indictment. In that case, we reversed the conviction for aggravated assault with a weapon likely to cause serious bodily injury, a method not alleged in the indictment.

In this case, Scott was indicted for two counts of aggravated assault, the assault of Danny Ray by shooting him with a pistol and the assault of Wendi Scott by striking her on

the head with a pistol. The trial court did not quote the statute or pattern charge verbatim, but instead instructed the jury that a person commits the offense of aggravated assault when he or she assaults another person with intent to murder or with any instrument that, when used offensively, is likely to result in serious bodily injury.[4] Thus, unlike the **Harwell** case, the trial court did not instruct the jury on an alternative method of committing aggravated assault that was not alleged in the indictment. Since the indictment gave the defendant notice that he was charged with committing aggravated assault in two ways and the trial court conformed its charge to the evidence presented in the case, we affirm Scott's convictions on both counts of aggravated assault.

3. Scott contends that his conviction for murder must be reversed because of the erroneous jury charge on aggravated assault. Unlike the case on which the defendant relies,[5] the jury here found Scott guilty of malice murder and not felony murder. Moreover, the trial court instructed the jury separately on malice murder and felony murder, clearly distinguished between the two types of murder, and further charged the jury that it could find Scott guilty of either malice or felony murder, but no both. Since the language that Scott challenges was part of the felony murder charge and the jury did not find Scott guilty of felony murder, we reject his contention that the aggravated assault charge tainted his conviction for malice murder.[6]

4. On the remaining enumerations, we conclude that the trial court did not err in (1) rejecting the defendant's argument that his reindictment on the same day as the dismissal of the first indictment violated his right to due process,[7] (2) granting the state's motion in limine to exclude evidence that Scott offered to take a polygraph, examination,[8] (3) ruling that

Scott could not testify about what a friend of Ray's told him concerning a fight between the friend and Ray, (4) when the defendant was allowed to introduce a certified copy of Ray's indictment for child molestation, (5) charging the jury that killing a spouse or a spouse's lover to prevent the act of adultery, without more, is murder,[9] or (6) denying a new trial based a juror's failure to disclose her former marriage twenty years earlier to the victim's first cousin.[10]

**Judgment affirmed. All the Justices concur.**

## DISPOSITION

**Judgment affirmed.**

## OPINION FOOTNOTES

[1] The shooting occurred on February 9, 1997. Scott was indicted on October 21, 1997, and reindicted on October 21, 1998. A jury found him guilty and the trial court sentenced him on November 6, 1999. Scott filed a motion for a new trial on November 17, 1999, which was denied on October 17, 2000. Scott filed a notice of appeal on October 20, 2000. The case was docketed on January 3, 2001, and orally argue on March 19, 2001.

[2] See **Jackson v. Virginia**, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560)(1979).

[3] 270 Ga. 765, 512 S.E.2d 892 (1999).

[4] See O.C.G.A.§ 16-5-21; see also **Dixon v. State**, 268 Ga. 81, 82, 485 S.E.2d 480 (1997) (defining aggravated assault as (1) an assault committed on the victim that (2) was aggravated by either (a) an intention to murder, rape, or rob or (b) the use of a deadly weapon).

[5] See **Peters v. State**, 261 Ga. 373, 405 S.E.2d 255 (1991).

[6] See **McKenzie v. State,** Ga. , 2001 Ga. LEXIS 432 (2001) (finding moot defendant's claim of error in the underlying felony portion of the felony murder charge since he was convicted of malice murder).

[7] See **Cox v. State**, 203 Ga. App. 869, 870, 418 S.E. 2d 133 (1992) (defendants showed no harm from prosecuting attorney's failure to enter a dismissal in the first proceeding prior to her reindictment for the same offense).

[8] See **Rucker v. State**, 272 Ga. 750 (534 S.E.2d 71) (200) (no error in excluding results of a polygraph test taken by a co-defendant without evidence of a stipulation that the results were admissible).

[9] See **Burger v. State**, 238 Ga. 171, 231 S.E. 2d 769 (1977).

[10] See O.C.G.A. § 15-12-163 (challenges to juror for cause). Cf. **Croom v. State**, 217 Ga. App. 596. 597, 458 S.E.2d 679 (1995) (fiancé is not yet related by marriage and therefore not subject to disqualification as next of kin).

APPENDIX B

**SUPREME COURT OF GEORGIA**

Case No. S01A0561

Atlanta, July 16, 2001

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

GLEN CARROLL SCOTT V. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

**SUPREME COURT OF THE STATE OF GEORGIA**

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court hereto affixed the day and year last above written.

s/Sherie M. Welch, Clerk